

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	
RIGHT G(W)024095-76L BY WALTER J.)	FINAL ORDER
AND PATRICIA L. VERMEDAHL)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the February 24, 1995, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, and limitations listed below, Authorization to Change Appropriation Water Right G(W)024095-76L is hereby granted to Walter J. and Patricia L. Vermedahl to add a third well located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, Township 22 North, Range 22 West, Lake County, Montana, to the existing manifold system for irrigation of 187 acres in the N $\frac{1}{2}$ of said Section 13. Authorization is also granted to change the place of use from 20 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$, Section 18, Township 22 North, Range 21 West and 80 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$, 32 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 40 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and 15 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 13, Township 13 North, Range 22 West, to 80 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$, 27 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$, and 80 acres in the NE $\frac{1}{4}$, for a total of 187 acres, all in Section 13, Township 22 North, Range 22 West.

CASE # 24095

FILED

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Mont. Code Ann. Title 85, Chapter 2, Part 2, and § 85-2-404.

B. This authorization is subject to the condition that the Appropriator shall install an adequate flow metering device in order to allow the flow rate and volume of all water diverted to be recorded. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 and/or upon request to the Water Resources Regional Office, 3220 Hwy. 93 S., P.O. Box 860, Kalispell, MT 59903 PH: (406) 752-2288.

C. This authorization is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes' position that economic investments made in reliance upon this authorization, do not create in the Appropriator any equity or vested right against the Tribes. The Appropriator is hereby notified that any financial outlay or work invested in a project pursuant to this authorization is at the Appropriator's risk.

Issuance of this authorization by the Department shall not reduce an Appropriator's liability for damages caused by exercise of this authorization, nor does the Department, in issuing this authorization, acknowledge any liability for damages caused by exercise of this authorization, even if such damage is a necessary and unavoidable consequence of the same. The Department does not acknowledge liability for any losses that an Appropriator may

experience should they be unable to exercise this authorization due to the future exercise of reserved water rights.

The State of Montana's jurisdiction to issue water rights within the exterior boundaries of the Flathead Indian Reservation has been challenged by the Confederated Salish and Kootenai Tribes in Cause No. CV92-54-M-CCL (United States District Court, District of Montana, Missoula Division - filed May 15, 1992) which case is currently pending. Any water right issued by the State in the absence of jurisdiction to issue the water right is void.

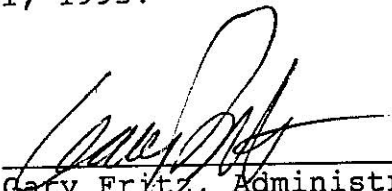
D. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 13 day of April, 1995.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 17th day of April, 1995 as follows:

Walter & Patricia Vermedahl
12699 Buffalo Bridge
Polson, MT 59860

Robert & Susie Thoft
14700 Buffalo Bridge Road
Polson, MT 59860

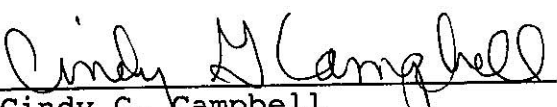
Roy Burton
Confederated Salish &
Kootenai Tribes
P.O. Box 278
Pablo, MT 59855

Sam E. Haddon
Boone, Karlberg & Haddon
P.O. Box 9199
Missoula, MT 59807-9199

Leslie Ann Budewitz
Wold Law Firm
P.O. Box 1212
Polson, MT 59860-1212

Charles Brasen, Manager
Kalispell Water Resources
Regional Office
P.O. Box 860
Kalispell, MT 59903-0860
(via electronic mail)

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301



Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) PROPOSAL FOR DECISION
RIGHT G(W)024095-76L BY WALTER J.)
AND PATRICIA L. VERMEDAHL)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on November 9, 1994, in Polson, Montana, to determine whether an Authorization to Change Appropriation Water Right should be granted to Walter J. and Patricia L. Vermedahl for the above Application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) (1993).

APPEARANCES

Applicants Walter J. and Patricia L. Vermedahl (Applicants) appeared at the hearing in person and by and through counsel, Leslie Ann Budewitz.

Ross Miller, Hydrogeologist with Land and Water Consulting, Inc. appeared at the hearing as a witness for Applicants.

Paul Smith, long time resident of Irvine Flats, appeared at the hearing as a witness for Applicants.

Objectors Robert A. and Susie M. Thoft appeared at the hearing in person and by and through counsel, Sam E. Haddon.

Marc Spratt, Hydrogeologist with Spratt and Associates, appeared at the hearing as a witness for Objectors.

Howard Delaney, former owner of Applicants' property, appeared at the hearing as a witness for Objectors.

Dr. Garry Grimestad, Consulting Hydrologist, appeared at the hearing as a witness for Objectors.

Dr. Marshall Corbett, Hydrogeologist with the Kalispell Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing as a witness for the Department.

EXHIBITS

Applicants offered three exhibits for inclusion in the record. All were accepted without objection.

Applicants' Exhibit 1 is a summary of Applicants' irrigation system as it was prior to 1984 and the improvements performed since 1984.

Applicants' Exhibit 2 consists of 18 pages and is a Hydrogeologic Review prepared by Land & Water Consulting, Inc. for Smith v. Thoft Complaint, White Earth Creek, on May 5, 1993, and revised on May 5, 1994.

Applicants' Exhibit 3 consists of two pages and is the *curriculum vitae* of Ross D. Miller.

Objectors offered 42 exhibits for inclusion into the record. All were accepted without objection.

Objectors' Exhibit A is a certificate of authenticity signed by James E. Kindle, Records Supervisor for the Water Resources Division of the Department.

Objectors' Exhibit A-1 consists of five pages and is a copy of Statement of Claim 76L-W141830 filed with the Water Court April 30, 1982, by Objectors.

Objectors' Exhibit A-2 consists of five pages and is a copy of Statement of Claim 76L-W141831 filed with the Water Court April 30, 1982, by Objectors.

Objectors' Exhibit A-3 consists of six pages and is a copy of Statement of Claim 76L-W141832 filed with the Water Court April 30, 1982, by Objectors.

Objectors' Exhibit A-4 consists of four pages and is a copy of Statement of Claim 76L-W141833 filed with the Water Court April 30, 1982, by Objectors.

Objectors' Exhibit A-5 consists of ten pages and is a copy of Statement of Claim 76L-W141836 filed with the Water Court April 30, 1982, by Objectors.

Objectors' Exhibit A-6 consists of six pages and is a copy of Statement of Claim 76L-W141837 filed with the Water Court April 30, 1982, by Objectors.

Objectors' Exhibit A-7 consists of fifteen pages and is a copy of Statement of Claim 76L-W141838 filed with the Water Court April 30, 1982, by Objectors.

Objectors' Exhibit A-8 consists of five pages and is a copy of Statement of Claim 76L-W141839 filed with the Water Court April 30, 1982, by Objectors.

Objectors' Exhibit A-9 consists of five pages and is a copy of Statement of Claim 76L-W141840 filed with the Water Court April 30, 1982, by Objectors.

Objectors' Exhibit D consists of two pages and is a certificate of authenticity signed by James E. Kindle, Records Supervisor for the Water Resources Division of the Department.

Objectors' Exhibits D-1 through D-13 consists of single pages which are abstracts of water rights 76L-C010855, 76L-C010856, 76L-C055715, 76L-C064917, 76L-C064918, 76L-C064919, 76L-C065058, 76L-C065654, 76L-C067769, 76L-C070100, 76L-W141829, 76L-W141834, and 76L-W141835.

Objectors' Exhibit G consists of 9 pages and is a copy of Application for Beneficial Water Use Permit 86384-g76L filed by Applicants.

Objectors' Exhibit H consists of six pages and is a copy of Objection to Application 86384-g76L filed by Objectors. Exhibit 1 to attachment "A" of this exhibit consists of 61 pages and is a copy of a report entitled, *Irvine Flats Hydrogeology Lake County, Montana* prepared for Objectors by Spratt & Associates. Exhibit 2 to Attachment "A" of this exhibit consists of nine pages and is a report to Sam Haddon by Dr. Garry Grimestad. Attachment "B" consists of a single page and is a listing of significant documents filed in Montana Twentieth Judicial District, Lake County, Cause No. DV-92-274. Exhibits 1 through 14 to Attachment "B" are copies of those documents.

Objectors' Exhibit H-1 consists of seven pages and is a copy of a Stipulation and Order, Lake County Cause No. DV-92-274, dated May 29, 1994, and filed June 6, 1994.

Objectors' Exhibit P is a copy of USGS maps which have been modified to show land ownership, watershed boundary, spring locations, and well locations among other things.

Objectors' Exhibit Q is another copy of the report entitled, *Irvine Flats Hydrogeology Lake County, Montana* prepared for Objectors by Spratt & Associates. (See Objectors' Exhibit H above.)

Objectors' Exhibit R is another copy of the report to Sam Haddon by Dr. Garry Grimestad. (See Objectors' Exhibit H above.)

Objectors' Exhibit V is a copy of a test data chart showing the relative water level of Vermedahl well 2, Thoft wells on and off, Vermedahl irrigation on, Smith Spring Sandpoint, Smith Pond, and Thoft irrigation on.

Objectors' Exhibit W is a copy of a test data chart showing the water fluctuations of Paul Smith's pond in response to the use of Thoft's well.

Objectors' Exhibit X is a copy of a test data chart showing the water fluctuations of Applicants' well in response to use of the Thoft well.

Objectors' Exhibit Y is a copy of a test data chart showing the water fluctuation of the Vermedahl well in response to the flow test of the Thoft well.

Objectors' Exhibit Z is a copy of a test data chart labeled Thoft well flow - Test of 16 - 21 March 1994, Vermedahl Well #2 Multi-rate Solution Trace.

Objectors' Exhibit AA is a copy of a test data chart showing the projected Thoft and Vermedahl impact on Smith Spring ground water level.

Objectors' Exhibit AB is a copy of a test data chart showing the Thoft well recovery following 4.92 days of flowing.

Objectors' Exhibit AC consists of six pages and is a copy of Statement of Claim W024095-76L filed with the Water Court by Applicants.

Objectors' Exhibit AD consists of nine pages and is a copy of Statement of Claim W024096-76L filed with the Water Court by Applicants.

Objectors' Exhibit AE consists of six pages and is a copy of the original Application for Change of Appropriation Water Right G(W)24095-76L which is the subject of this proceeding.

Objectors' Exhibit AF consists of two pages and is a copy of amendments filed to amend Statement of Claim W024095-76L.

Objectors' Exhibit AG consists of two pages and is a copy of amendments filed to amend Statement of Claim W024096-76L.

Objectors requested the Hearing Examiner to take official notice of the *Lake County Water Resources Survey* which was published in 1963, specifically page 20, to note the irrigation in use at the time the survey was made. There being no objection from Applicants, the Hearing Examiner agreed.

The Department file was made available for review by all parties who expressed no objection to any part of it with the exception of the erroneous public notice which is discussed

below; therefore, the Department file is accepted into the record in its entirety.

PRELIMINARY MATTERS

During their opening statement, Objectors objected that notice was defective in that the notices misstated the past place of use. Objectors argued that they were unable to adequately prepare their case as a result. The Hearing Examiner reserved ruling on the objection and proceeded with the hearing. Objectors then stated a continuing objection to proceeding. For reasons that will follow, the objection is now overruled.

First, Objectors can hardly complain that they did not have adequate notice of the past place of use because they had actual knowledge of where the water was used. While it is true that both the public notice and notice of hearing misstated the past place of use of a portion of the existing right, the Objectors clearly knew where the water has actually been used. Actual knowledge constitutes notice. Mont. Code Ann. § 1-1-217 (1993).

Further, Objectors waited too long to make their objection to the notice. If Objectors felt disadvantaged by the misstatement in the notices, they could have requested a continuance prior to the hearing while the Department renoticed the hearing. Mont. Admin. R. 36.12.222 (1994). By waiting until the hearing to voice their concern, the Objectors foreclosed the Department's ability to correct the error¹ and

¹Requests for continuances based on lack of proper notice made less than 10 days prior to the hearing can only be granted upon a showing that the reason for the request could not have

waived any right they may have had to a continuance or renoticing.

Finally, the misstatement of past place of use in the notice was a harmless error. The purpose of the notice is to allow other water users to make an initial determination of whether or not they would be adversely affected. The critical element for identifying possible adverse effect to other water rights in the area is the point of diversion which is correctly identified in the notice. The Objectors, therefore, were provided with sufficient information in the notice to determine if their right might be adversely affected by the change. That Objectors had sufficient information to make this initial determination is evident from the fact that they objected to the application in the first place.

As part of their defective notice objection, Objectors also point to errors in Applicants' claims of existing rights. Objectors pointed to an apparent scrivener's error in Applicant's claims of existing water rights that identified the place of use in the wrong township. Objectors further complain that the amount of water claimed for the existing right apparently exceeds actual use. Erroneous or inflated claims for existing rights in the adjudication do not constitute defective notice in Department change authorization proceedings.

After Dr. Corbett's testimony, counsel for Objectors requested sufficient time to respond to that testimony. The

been ascertained earlier. Mont. Admin. R. 36.12.222(3) (1994).

record was left open until December 1, 1994, for Applicants and Objectors to submit responses. Upon receipt of those responses on or before December 1, 1994, the record was closed.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Change of Appropriation Water Right G(W)024095-76L in the name of and signed by Walter J. and Patricia L. Vermedahl was filed with the Department on February 15, 1994. (Department file and Objectors' Exhibit AE.)

2. Applicants are the owners of the water right claimed by Statement of Claim W024095-76L which originally claimed use of ground water diverted by means of a well located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, Township 22 North, Range 22 West. The claimed flow rate was 350 gallons per minute up to 275 acre-feet per year for irrigation of 40 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, 40 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, and 40 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, Township 22 North, Range 22 West, for a total of 120 acres. The claimed priority date is January of 1952. On February 15, 1994, Applicants amended Claim W024095-76L by increasing the flow rate to 750 gallons per minute up to 350 acre-feet per year. The place of use was amended as follows: 80 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 18, Township 13' North, Range 21 West and 80 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$, 32

'There is apparent scrivener error in the amended claims. It is clear that the use is in Township 22 North.

acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 40 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, and 15 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 13, Township 13 North, Range 22 West, for a total of 247 acres irrigated. Applicants also own the water right claimed by Statement of Claim W024096-76L which originally claimed use of ground water diverted by means of a well located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, Township 22 North, Range 22 West. The claimed flow rate is 350 gallons per minute up to 275 acre-feet per year for irrigation of 40 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, 40 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, and 40 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 13, Township 22 North, Range 22 West and 10 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, Township 22 North, Range 21 West, for a total of 130 acres. The claimed priority date is 1932. On February 15, 1994, Applicants amended Claim W024096-76L by increasing the flow rate to 500 gallons per minute. The place of use was amended as follows: 80 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 18, Township 13' North, Range 21 West and 80 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$, 32 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 40 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, and 15 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 13, Township 13 North, Range 22 West, for a total of 247 acres irrigated. (Department file and Objectors' Exhibits AC, AD, AF, and AG.)

3. Application G(W)024095-76L requests authorization to change the point of diversion of both Statements of Claim by adding a third well located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, Township 22 North, Range 22 West, and to change the place of use of both amended Statements of Claims from 80 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$,

¹See n. 2.

Section 18, Township 22 North, Range 21 West and 80 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$, 32 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 40 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and 15 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 13, Township 13 North, Range 22 West, to 80 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$, 15 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, and 152 acres in the NE $\frac{1}{4}$, all in Section 13, Township 22 North, Range 22 West. (Department file, Objectors' Exhibit AE, and testimony of Walter Vermedahl.)

4. Pertinent portions of the application were published in the *Lake County Leader*, a newspaper of general circulation in the area of the source on May 12, 1994. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed change.

Two timely objections to the application were received by the Department and Applicants were notified of the objections by a letter dated July 29, 1994. (Department file.)

5. Applicants own and operate a cattle ranch and Mr. Vermedahl trains horses. When Applicants purchased their ranch in 1973, there were two wells, one equipped for a 40 or 45 horsepower pump and the other with a 25 horsepower pump, and a hand line irrigation system in place, including a riser to supply water to acreage in Section 18, Township 22 North, Range 21 West. At that time the well with the larger pump was in poor condition. In 1984, Applicants had a third well drilled and installed new pumps in the other two wells. The new well was equipped with a 15 horsepower pump, a 15 horsepower pump was installed in one of

the old wells, and the other received a 25 horsepower pump. One of the old wells has a 10 inch casing and the other a 12 inch casing. The new well has an eight inch casing. All the wells are approximately the same depth. The system is a manifold system where all wells are connected to the irrigation system. The maximum flow rate the three wells will produce with the pumps now in place is 750 gallons per minute.

A new buried mainline was installed to replace the other which was leaking badly. The three-sixteenth inch nozzles were replaced with eleven sixty-fourth inch nozzles on Applicants' existing wheel lines and hand lines to increase the pressure and provide a more even distribution. Another wheel line was installed to replace some of the hand line. Hand lines are still used to irrigate the calving pasture and the acreage around the house.

The land now irrigated in Section 13, Township 22 North, Range 22 West, was accomplished by extending the mainline and installing three wheel lines in a row to irrigate approximately 127 acres on the south side of the mainline and by irrigating approximately 120 acres on the north side of the mainline. There have been no changes to the system since 1984. Water from the system is used by the plants or lost through the evapotranspiration. There is no runoff. (Testimony of Walter Vermedahl, Applicants' Exhibit 1, and Department file.)

6. Applicants have noticed no effect of the new well on their flowing wells located over one-half mile from their

irrigation wells; however, the wells located less than one-half mile from the irrigation wells do show effect from pumping these wells. There are no other wells within a mile of Applicants' new well. It is two and one-half miles from Applicants' well to Objectors' wells. Paul Smith's spring is located approximately three and one-half miles north of Applicants' well. Mr. Smith has noticed no response in his spring to Applicants' well use. (Objectors' Exhibit Q, Department file, and testimony of Walter Vermedahl and Paul Smith.)

7. There were no concerns expressed when the new well was drilled in 1984 nor have Applicants received any complaints about the use of the well. Thofts did not make a complaint against Applicants even though they knew Applicants had drilled a new well. (Testimony of Walter Vermedahl and Robert Thoft.)

8. Applicants thought the well driller had taken care of the filing of the well in 1984 and did not realize authorization was needed from the Department to make such a change since the change was simply to add a well to the existing system without using more water than before. It was not until 1993, when a special ground water master and Ross Miller, working on a different matter, informed Applicants of the need to seek approval from the Department. Applicants immediately began the process with the Department. (Testimony of Walter Vermedahl.)

9. The original Declaration of Vested Ground Water Rights filed by Pickett Brothers, former owners of the property, on the two older wells claimed a flow rate of 1,000 gallons per minute.

Howard Delaney, another previous owner of Applicants' property, testified to the use of 350 gallons per minute per well. The wells cannot produce more than 750 gallons per minute with the pumps now in the wells. More than likely, the current flow rate produced by the pumps in the wells is approximately 700 gallons per minute. (Testimony of Walter Vermedahl and Howard Delaney, Department file, and Objectors' Exhibits AC, AD, AE, AF, and AG.)

10. Howard Delaney testified to irrigating 20 acres in Section 18, Township 22 North, Range 21 West. Pickett Brothers, however, irrigated only in Section 13 on approximately the same land Applicants are irrigating now. Applicants do not irrigate in Section 18. (Testimony of Howard Delaney, Paul Smith, and Walter Vermedahl.)

11. Objectors Thoft moved to their ranch in Irvine Flats in 1979. At that time, the previous owner said the irrigation well flowed 500 gallons per minute. The well driller stated on the well log for the old well that the flow was 500 gallons per minute and the well was completed at a depth of 142 feet. Mr. Thoft did not measure the flow rate, but could irrigate using three wheel lines with small nozzles that required approximately 180 gallons per minute. Thofts irrigate 100 acres in Section 2, Township 23 North, Range 22 West, and 40 acres in Section 35, Township 22 North, Range 22 West. Over time, the flow of the well diminished. In 1988, only one wheel line could be operated. A well driller was consulted and Objectors determined a new well should be drilled. The new well was completed at a depth of 220

feet. The casing was perforated from 136 feet to 146 feet. Although the driller measured the flow rate of the new well at 40 gallons per minute, the new well flows approximately 240 gallons per minute. The priority date claimed by Objectors for the old well and new well is January 24, 1973. Since the new well does not produce the desired quantity of 500 gallons per minute, the old well is still in use, producing from 180 to 200 gallons per minute. (Testimony of Robert Thoft and Marshall Corbett, Objectors' Exhibit A-7, and Department records.)

12. Since 1979, Einar Thorsrud, a neighbor to the south of Thofts, has completed 13 small irrigation wells which are allowed to flow constantly. The majority of these wells are located approximately one-half mile south of Thofts. Applicants' wells are two and one-half miles south of Thofts. (Testimony of Robert Thoft, Department records, and Objectors' Exhibit Q.)

13. Average rainfall in the Irvine Flats area is only nine and one-half inches per year. It is necessary to irrigate pastures and hay crops to provide feed for the livestock. (Testimony of Walter Vermedahl, Robert Thoft, Marc Spratt.)

14. Four ground water experts appeared at the hearing. All agree there is one aquifer and all the wells discussed in this Proposal are interconnected. The degree of interconnection in certain areas is less than in other areas. All agree the water bearing material is located beneath a thick layer of impervious material, thus causing pressure which results in some flowing wells and springs. All agree there is recharge from the bedrock;

some recharge is from bedrock at the sides of the valley and some is from bedrock in the bottom of the valley. All agree the streams do not contribute to the aquifer, but the aquifer contributes to the streams in the form of springs which flow into the streams. There are areas where the experts do not agree, such as the amount of water available from the Miocene sediments and whether the Applicants' well affects Objectors' wells and Smith Spring. However, most importantly, all agree there would be no adverse effect if Applicants' three wells did not produce a higher flow rate and volume of water than the original two wells. (Testimony of Ross Miller, Marc Spratt, Dr. Garry Grimestad, and Dr. Marshall Corbett.)

15. There are no unperfected permits in the proposed source and no reservations have been granted by the Board of Natural Resources and Conservation for the proposed source. (Department records.)

16. The proposed change in appropriation water right does not involve salvaged water. (Department file.)

17. No valid objections relative to water quality were filed for this application. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave notice of the hearing and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before

the Hearing Examiner and the Department has jurisdiction over subject matter herein and the parties hereto. See Preliminary Matters and Findings of Fact 1, 2, 3, and 4.

2. Applicants have proven by a preponderance of evidence that irrigation is a beneficial use. See Findings of Fact 5 and 13.

3. Applicants have proven by a preponderance of evidence the proposed use would not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved. See Findings of Fact 5, 6, 7, 8, 9, 11, 12, 14, and 15.

4. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 5 and 7.

5. Applicants have possessory interest, or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use. However, Applicants have not proven by a preponderance of evidence that 80 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 18, Township 22 North, Range 21 West, had been irrigated. The record shows that only 20 acres were irrigated. See Findings of Fact 5 and 10.

6. Applicants are not required to show water saving methods. See Finding of Fact 16.

7. Applicants are not required to prove no adverse effect to water quality or the ability of a discharge permitholder to satisfy effluent limitations. See Finding of Fact 17.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, and limitations listed below, Authorization to Change Appropriation Water Right G(W)024095-76L is hereby granted to Walter J. and Patricia L. Vermedahl to add a third well located in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, Township 22 North, Range 22 West, Lake County, Montana, to the existing manifold system for irrigation of 187 acres in the N $\frac{1}{2}$ of said Section 13. Authorization is also granted to change the place of use from 20 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$, Section 18, Township 22 North, Range 21 West and 80 acres in the S $\frac{1}{2}$ NE $\frac{1}{4}$, 32 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 40 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and 15 acres in the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 13, Township 13 North, Range 22 West, to 80 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$, 27 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$, and 80 acres in the NE $\frac{1}{4}$, for a total of 187 acres, all in Section 13, Township 22 North, Range 22 West.

A. The approval of this change in no way is to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Mont. Code Ann. Title 85, Chapter 2, Part 2, and § 85-2-404.

B. This authorization is subject to the condition that the Appropriator shall install an adequate flow metering device in order to allow the flow rate and volume of all water diverted to be recorded. The Appropriator shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 and/or upon request to the Water Resources Regional Office, 3220 Hwy. 93 S., P.O. Box 860, Kalispell, MT 59903 PH: (406) 752-2288.

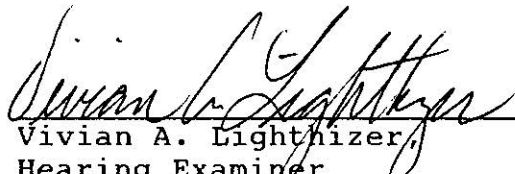
C. This authorization is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. It is the Tribes' position that economic investments made in reliance upon this authorization, do not create in the Appropriator any equity or vested right against the Tribes. The Appropriator is hereby notified that any financial outlay or work invested in a project pursuant to this authorization is at the Appropriator's risk.

Issuance of this authorization by the Department shall not reduce an Appropriator's liability for damages caused by exercise of this authorization, nor does the Department, in issuing this authorization, acknowledge any liability for damages caused by exercise of this authorization, even if such damage is a necessary and unavoidable consequence of the same. The Department does not acknowledge liability for any losses that an Appropriator may experience should they be unable to exercise this authorization due to the future exercise of reserved water rights.

The State of Montana's jurisdiction to issue water rights within the exterior boundaries of the Flathead Indian Reservation has been challenged by the Confederated Salish and Kootenai Tribes in Cause No. CV92-54-M-CCL (United States District Court, District of Montana, Missoula Division - filed May 15, 1992) which case is currently pending. Any water right issued by the State in the absence of jurisdiction to issue the water right is void.

D. Upon a change in ownership of all or any portion of this authorization, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

Dated this 24th day of February, 1995.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6615

MEMORANDUM

This change authorization has cut back the acres that can be changed from Section 18, Township 22 North, Range 21 West, to Section 13. The record indicates that only 20 acres in the NW $\frac{1}{4}$ of Section 18, were irrigated instead of the 80 acres claimed by Applicants. Therefore only 20 acres may be changed.

This is not an adjudication of the Applicants' water right. *See In re Applications P49632-s41H, G120401-41H, and G120403-41H by Estate of Lena Ryen; In re Application 42666-g41F by Richard MacMillan.* It is a determination of the amount of acreage which can be allowed to be changed pending final determination of the right by the Water Court. The underlying water rights are not diminished by this determination. Should the final determination of the Water Court confirm the claimed amount of acreage, Applicants could reapply to change the remaining 60 acres.

In his closing statement, counsel for Objectors asked the Hearing Examiner not to reward Applicants for drilling and using the well without authorization by granting an authorization to change appropriation water right. He recommended denying the authorization as the only appropriate action. Although drilling the well without authorization is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of an authorization. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). The Department is without authority to deny an authorization on such grounds. *See In re Application 52031-s76H by Frost.* Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of an authorization. *See In re Application 61978-s76LJ by Town.* Here, Applicants have used the well since 1984, receiving no complaints from other water users in the area even though it was common knowledge that a new well had been installed. Therefore the

Department must conclude the means of diversion, construction, and operation of the appropriation works are adequate and that the proposed use will not adversely affect the water rights of other persons.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 24th day of February, 1995, as follows:

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Cindy G. Campbell
Hearings Unit Legal Secretary